Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1977

No. 78-12

BENEDETTO CONIGLIO, a/k/a "BENNY,"

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL WINOGRAD
Attorney for Petitioner
950 Third Avenue
New York, New York 10022
(212) 688-1726

JULIA PAMELA HEIT
Of Counsel

775 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

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To: The Honorable, the Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:

The petitioner, Benedetto Coniglio, respectfully prays that a writ of certiorari issue to review the judgment and oral opinion of the United States Court of Appeals for the Second Circuit entered on May 17, 1978, affirming a judment of the United States District Court for the Southern District of New York, convicting him, after trial, of conspiring to violate §§812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code. Reargument was denied on June 6, 1978.

OPINION BELOW

The opinion of the Court of Appeals was issued from the bench, and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 17, 1978, and is set forth in the Appendix hereto. Reargument was denied on June 6, 1978 (see court's order attached hereto in the Appendix).

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

No extension of time within which to file the instant petition has been sought.

QUESTION PRESENTED

1. Whether, pursuant to the *Geaney* test, the United States Court of Appeals was precluded from considering any of the hearsay declarations of the co-conspirators in determining whether there existed a fair preponderance of independent non-hearsay evidence to justify a finding that petitioner was a member of the conspiracy.

STATEMENT OF THE CASE

On October 27, 1977, petitioner proceeded to trial before the Honorable Kevin Thomas Duffy on a single count indictment charging him with conspiring to violate the narcotics laws (Title 21, §§812, 841(a)(1) and 841(b)(1)(A)). Also named in this indictment as co-defendants and co-conspirators were Patrick DiLacio, Dominick Forte, and Chin Wai Mow.

It is petitioner's position that even upon viewing the evidence in a light most favorable to the government, the proof, at most, established only an "association" between petitioner and the co-conspirators, but failed to establish that "illicit association" that would sustain the admission into evidence of the voluminous hearsay declarations of the co-conspirators as against petitioner.

Even if we were to accept the fact that the acts of the co-conspirators established a conspiracy to sell narcotics to the undercover agent, it is clear that petitioner's acts, independent of the hearsay declarations of the co-conspirators, failed to connect him to any ongoing conspiracy. These acts consisted of the following:

1. On the evening of July 19th at 9:36 p.m., a telephone call was made from Forte's phone to Ft. Lauderdale, Florida.

2. On July 27th at 12:20 a.m., petitioner and DiLacio were observed arriving at 814 Neill Avenue in the Bronx, the residences of the co-conspirators. The two men left the premises at 1:00 a.m.

3. On July 28th at 5:50 p.m., petitioner and DiLacio were again observed arriving at this address in a brown Oldsmobile which was registered in petitioner's name. Co-conspirators Forte and Chin, who had been standing in front of the premises, greeted the two men, and the men then went into the building.

4. Finally, at about 8:10 p.m., appellant was seen leaving this address, "walking hurriedly." As the agents approached him, Agent Kin'ole saw petitioner throw a "tubular object on the ground" which turned out to be a thermometer. Immediately prior to petitioner's emergence from this address, the co-conspirators had been arrested.

This was the sum total of independent evidence, which the court found was sufficient to justify the admission into evidence as against petitioner the co-conspirator's hearsay declarations.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals, in affirming petitioner's conviction, in essence, adopted the government's position. The thrust of the court's position was that under the mandate of *United States v. Geaney,* 417 F.2d 1116 (2d Cir. 1969), it was incumbent upon the court to view the totality of the evidence, rather than considering the individual facts in isolation as they applied only to petitioner. We submit that by virtue of its holding in this case, the Court of Appeals has seriously undermined the mandate of *United States v. Geaney,* and its progeny, in this Circuit and, in effect, renders the fair preponderance of independent evidence test a nullity.

We recognize in accordance with the court's decision below that circumstantial evidence can certainly be taken into consideration and deemed part of the independent type of proof required to connect a defendant to the conspiracy. However, under no circumstance can this circumstantial evidence consist of hearsay testimony. Thus, in the present case, the only means by which petitioner's acts assume any significance here is by a consideration of the hearsay evidence. We maintain, however, that the government cannot be permitted to resort to hearsay evidence to cast petitioner's actions in a suspicious light.

It is only because of Chin's many hearsay declarations that petitioner could be deemed a member of the conspiracy. Absent Chin's statements, the independent proof against petitioner is rendered totally innocuous.

As pointed out, the sum total of petitioner's activities consisted of two visits to the co-conspirators' homes; one telephone call to Ft. Lauderdale; a third visit to the co-

conspirator's home; petitioner leaving the premises after the arrest of the co-conspirators; and finally, upon his arrest, his throwing a thermometer to the ground. Such evidence is of too vague and unpersuasive a nature to connect petitioner to any conspiracy.

In order to preclude a total subversion of the independent evidence test in the Second Circuit, we urge that this Court should grant review of this case, and thereafter, determine the case uninfluenced by the welter of hearsay evidence that permeated the entire case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

s/ Joel Winograd
Attorney for Petitioner

JULIA PAMELA HEIT
Of Counsel

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Filed June 9, 1977)
A. Daniel Fusaro, Clerk

Docket No. 78-1081

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENEDETTO CONIGLIO, a/k/a "Benny," PATRICK G. DiLACIO, a/k/a "Patty," DOMINICK FORTE, and WAI MOW CHIN,

Defendants,

v.

BENEDETTO CONIGLIO, a/k/a "Benny,"

Defendant-Appellant.

Before:

HON. IRVING R. KAUFMAN, *Chief Judge,* and WILLIAM H. MULLIGAN and ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judges.*

New York, May 17, 1978

Statement made by the court at disposition of appeal in open court.

JUDGE KAUFMAN:

We will affirm.

The appellant's sole argument is that Judge Duffy erred in admitting the out-of-court statements made in furtherance of the conspiracy by Chin, Forte and DiLacio because the non-hearsay evidence was insufficient to establish that he was a member of the conspiracy. Federal Rule of Evidence 801(d)(2)(E) permits the admission of hearsay declarations of co-conspirators but such declarations are only admissible if the direct and circumstantial evidence, viewed in the light most favorable to the government, establishes the defendant's participation in the conspiracy by a fair preponderance of the independent non-hearsay evidence. I cite you specifically to *U.S. v. Mangan,* Slip op. 2183 (2d Cir. Ap. 3, 1978), written by Judge Friendly; and another opinion by Judge Friendly, *U.S. v. Geaney,* 417 F.2d 1116. There are several other cases standing for this elementary proposition of conspiracy law.

We recognize that there must be some basis for inferring that the defendant knew about the enterprise and intended to participate. But circumstantial evidence alone may prove the conspiracy. And pieces of evidence which taken alone might be susceptible to an innocent explanation when viewed together may justify an inference of conspiracy. See *U.S. v. Stanchich,* 550 F.2d 1295 and *U.S. v. Geaney, supra.*

The non-hearsay evidence in this case rules out the possibility that appellant's association with the co-conspirators was merely social. (1) On the night of July 19, DiLacio

committed the conspirators to the purchase of five pounds of heroin for $230,000, just forty minutes after making calls to Deer Park, New York, and another telephone call one minute after that to Fort Lauderdale, Florida — towns where appellant had residences. (2) Less than an hour after appellant left a meeting with the conspirators, during the early hours of July 27, Chin reported to government agent Peter Pao that the deal had been changed to a purchase of a one pound sample for $46,000. (3) Appellant was present with other co-conspirators at 814 Neill Avenue, where the deal was to be completed, while the transaction was in progress elsewhere. (4) In response to a government agent's warning telephone call, the appellant fled from 814 Neill Avenue and when he was accosted by government agents, he furtively disposed of a fourteen inch thermometer, which the testimony indicated was capable of testing heroin. Appellant argues that the ongoing progress of the conspiracy cannot be considered in evaluating the non-hearsay evidence. But the defendant's conduct must be viewed in the context of surrounding circumstances. And, in the context of the conspiracy, it is highly unlikely that appellant's actions were innocent. The introduction of the hearsay evidence was justified. Accordingly, we affirm.

A true copy,

s/ A. Daniel Fusaro
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of June, one thousand nine hundred and seventy-eight.

Present:

HONORABLE IRVING R. KAUFMAN

HONORABLE WILLIAM H. MULLIGAN

HONORABLE ELLSWORTH VAN GRAAFEILAND

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENEDETTO CONIGLIO, a/k/a "Benny",

Defendant-Appellant.

78-1081

A petition for a rehearing having been filed herein by counsel for the appellant Benedetto Coniglio

Order

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO,
Clerk

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No. 78-12

In the Supreme Court of the United States

OCTOBER TERM, 1978

BENEDETTO CONIGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-12

BENEDETTO CONIGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the admissibility of out-of-court statements of his co-conspirators.

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to distribute heroin and conspiring to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment, to be followed by a three-year term of special parole.[1] The court of appeals affirmed the judgment in open court and delivered a brief oral opinion (Pet. App. 1a-3a).

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[1]Also charged with petitioner in the indictment were co-defendants Wai Mow Chin, Dominick Forte, and Patrick DiLacio; all three entered guilty pleas. Chin was sentenced to two years' probation and

The evidence at trial showed that petitioner, together with Wai Mow Chin, Dominick Forte, and Patrick DiLacio, conspired to purchase and possess with intent to distribute five pounds of pure Asian heroin. Petitioner was the central figure in the conspiracy, both as the source of funds for the deal and as the person responsible for approving the transaction.

In late June of 1977, Peter Pao, an undercover agent assigned to the Drug Enforcement Administration, met with co-defendant Wai Mow Chin and offered to sell him a large amount of heroin. Chin said he believed co-defendants Dominick Forte and Patrick DiLacio would be interested in buying as much as 15 pounds of heroin (Tr. 25-32). Agent Pao subsequently met with Chin and told him he would be willing to sell five pounds of heroin (Tr. 33-39). Chin then introduced Agent Pao to Forte, to whom Pao made an offer to sell the heroin (Tr. 42).

On the evening of July 19, 1978, Chin told Pao that one of Forte's associates, co-defendant DiLacio, was interested in buying the heroin (Tr. 44-47; Gov't Exh. 20A) and that "his people" could supply the money for the purchase. After further negotiations, DiLacio agreed to purchase five pounds of heroin (Tr. 49-51; Gov't Exh. 20C). While negotiations for the purchase were being conducted, calls were made from Forte's home to Deer Park, New York, and Fort Lauderdale, Florida, where petitioner had residences (Tr. 152, 204). At a subsequent meeting, DiLacio told Pao that he and his "partner," who was then in Florida, would pay $230,000 for the five pounds of heroin, and that his " partner" would be there

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a $5,000 fine; Forte was sentenced to five years' probation; and DiLacio was sentenced to eight years' imprisonment, to be followed by a three-year term of special parole. Subsequently, DiLacio's term of imprisonment was reduced to four years.

for the transaction (Tr. 65). On the night of July 26-27, Chin told Pao that DiLacio's partner was at Forte's apartment (Gov't Exh. 20G). That same night, surveillance agents saw petitioner arrive at Forte's address with DiLacio, enter the building, and leave after a brief stay (Tr. 133-136). Shortly thereafter, Chin told Agent Pao that DiLacio and his partner had changed their plans, and that now they were willing to purchase only a single pound of the heroin for $46,000, and that they wanted to test it before buying it (Gov't Exh. 20G).

After further negotiations, in which Chin told Pao that petitioner would not be attending when the money was passed because he "really doesn't want to meet anybody" (Gov't Exh. 26A), Pao agreed to sell a single pound of heroin for $46,000 (Tr. 93). When DiLacio and Chin delivered the $46,000 to Pao, Pao arrested them (Tr. 101-109). Forte was arrested shortly thereafter as he left his apartment. Another agent then placed a call to Forte's apartment and addressed the person who answered as "Benny" (petitioner's nickname). The agent identified himself as a friend and said that DiLacio had been arrested (Gov't Exh. 30). Shortly thereafter, petitioner was seen hurrying out of Forte's apartment. As the agents approached him, petitioner threw a tubular object into the street. The object proved to be a long thermometer of a type used to test heroin (Tr. 188-190; Pet. App. 3a).

2. Petitioner's sole contention is that there was not sufficient independent evidence of his participation in the narcotics conspiracy to permit the admission of the out-of-court statements of his alleged co-conspirators. Petitioner does not challenge the Second Circuit's rule that permits the admission of co-conspirators' statements if the defendant's participation in the conspiracy is

established by a preponderance of independent evidence. See *United States* v. *Geaney*, 417 F. 2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). Contrary to petitioner's claim, it is clear that the independent evidence was sufficient to justify the admission of the co-conspirators' declarations against him.

During the evening of July 19, co-conspirator DiLacio committed the conspirators to the purchase of five pounds of heroin for $230,000 only minutes after making telephone calls to Deer Park, New York, and Fort Lauderdale, Florida, where petitioner had residences. Less than an hour after petitioner left a meeting with the conspirators, during the early morning of July 27, Chin changed the terms of the offer from a five-pound purchase to the purchase of a one-pound sample of the heroin. Moreover, petitioner was present at Forte's apartment, where the drug purchase was to be completed (Tr. 98-99, 187-188), while Chin and DiLacio were delivering the $46,000 to Pao. Finally, in response to the fabricated warning call to petitioner at Forte's apartment (Tr. 170-171; Gov't Exh. 30A), petitioner fled from the apartment in haste, and when he was approached by government agents, petitioner furtively disposed of a 14-inch thermometer, of a type usable for testing heroin (Tr. 189-190, 197-198).

In sum, a fair preponderance of independent evidence established that petitioner participated in the drug conspiracy with Chin, Forte, and DiLacio. The trial court thus properly admitted into evidence various out-of-court statements of the co-conspirators identifying petitioner as their leader.[2]

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[2]Petitioner has not claimed that the admission of the co-conspirators' declarations in this case would violate the standard applied in any other circuit, and we know of no case suggesting that it would.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1978